ARTICLES >>
Rise to the Occasion
*By: Rich Rivera & Graham Ryan*

To Split or Not to Split?
By: Rich Rivera

NEWS AND ANNOUNCEMENTS >>
Call for Article Submissions – We Need Authors!

ARTICLES

**Rise to the Occasion**  
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Harvey, Irma, Maria, and now Nate: these names all have different meanings following this past hurricane season. These storms have left a wake of death and destruction in their path through Texas, Florida, the Caribbean, and the Gulf Coast. While the damage has already been done, it is not too late to help those affected cope with their losses and start to rebuild.

It is incumbent on the lawyers of America to provide pro bono service to those in need. While it is not only our duty to provide these services when widespread disaster strikes, these disasters serve as a stark reminder of the help that people need. We beseech you to find out how you and your colleagues can help those in need, either in the communities affected by the storms, or in your own community, and then act.

Following the storms, ABA President Hilarie Bass released a statement: “People need our help – I have no doubt that the lawyers of America will rise to the occasion.” It is time for us young lawyers to lead the pack and rise.

Let us find the silver lining in these dark clouds and use the storms as a call to action to remember that there are those less fortunate in our communities that are in need of legal assistance now and in every season.

For those that can help in the areas affected by the storms, the ABA is hosting a bevy of resources for those interested in providing pro bono services to those affected by the storm. They are available at [https://www.americanbar.org/groups/committees/disaster/disaster_relie](https://www.americanbar.org/groups/committees/disaster/disaster_relie).
Also, be sure that residents in your state are aware of the ABA YLD Disaster Legal Services (DLS) program, which offers pro bono disaster legal services to low-income survivors of a federally-declared disaster. More information on DLS program and phone numbers for various state “disaster legal hotlines” can be found at https://www.americanbar.org/groups/young_lawyers/disaster_legal_services.html. The DLS program was established in 1978 by the Federal Emergency Management Agency (FEMA) in partnership with the ABA YLD provide pro bono disaster legal services to low-income survivors of a federally-declared disaster. When a Federal government issues a disaster declaration in a particular state, FEMA and the ABA YLD, through the state’s young lawyer representative, coordinate with bar associations, legal aid groups, and law firms to implement the Disaster Legal Services program.

For those able to help in other communities, the ABA Standing Committee on Pro Bono & Public Service always has information about how attorneys can help those in need. Its webpage is located at https://www.americanbar.org/groups/probono_public_service.html.

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To Split or Not to Split?
By: Rich Rivera

Four bills have been introduced during the current Congress to restructure the Ninth Circuit Court of Appeals. In August, a hearing of the Senate Judiciary Committee’s subcommittee on privacy, technology, and the law was held on the bill introduced by Senator Jeff Flake, from Arizona.¹ This version of the bill would retain California, Hawaii, Oregon, Guam, and the Northern Mariana Islands in the Ninth Circuit and create a new Twelfth Circuit Court of Appeals encompassing Alaska, Arizona, Idaho, Montana, Nevada and Washington. During the hearing, five witnesses testified, coming out 3-2 in favor of splitting the Ninth Circuit along the lines drawn in Senator Flake’s bill.

The debate over whether the Ninth Circuit should be split is not a new one and the reasons cited in support of splitting it are varied. The Ninth Circuit comprises roughly a fifth of the U.S. population. As a result it sees far more appeals than any other Circuit Court of Appeals, which has caused a backlog of cases that takes longer to resolve in the Ninth Circuit as other Circuits. Proponents of the split claim that in the Ninth Circuit, it takes, on average, 15 months for an opinion to issue on a case.² The disparity in average claims is likely affected by the hundreds of cases that are terminated through the Ninth Circuit’s mediation unit, which settled over 1,000 cases in 2016.³

Second, by having a large number of constituent districts, many with diametrically opposed political leanings, and a total of 48 judges, a litigant does not have any idea of what kind of panel it can expect upon taking an appeal. This make up has likely contributed the Ninth Circuit being regarded as the most reversed court of appeals—a questionable title⁴ that has been used by proponents such as President Trump when he called for its split following its ruling against the president’s sanctuary order.⁵ Proponents of a restructure believe that the smaller states would get more of a political say in decisions of the new Twelfth Circuit and would permit the new Twelfth Circuit to break from previous decisions of the Ninth Circuit.⁶

A circuit split, while rare, is not unprecedented. In 1929, the five most western states of the Eighth Circuit were split into the Tenth Circuit. In 1981, Florida, Georgia, and Alabama were split from the Fifth Circuit into the Eleventh Circuit. One of the Eleventh Circuit’s first acts was to adopt the pre-split decisions of the Fifth Circuit as binding precedent.⁷ In an October 2017 decision, Savannah College of Arts & Design v. Sportswear,⁸ the Eleventh Circuit held that one of the Fifth Circuit’s decisions from the 1970’s must be applied even though it was not founded

⁴ See id at 8.
⁷ Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981).
on sound legal analysis and the Eleventh Circuit panel disagreed with the result. This highlights the difficulty in breaking stare decisis, so even if a Twelfth Circuit formed from politically like-minded states, it would not be unlikely that it would choose to view Ninth Circuit case law as continuing to bind its decisions.

Opponents of the split, which include most of the judges sitting on the Circuit, argue that a split would not help the delay and backlog. Instead of splitting the Circuit, and thereby splintering its resources, opponents would increase the number of judgeships in the circuit to spread the workload. Opponents also point out that the large population of the Ninth Circuit is due to California holding a tenth of the country’s population. Thus, wherever California goes will likely have a high backlog due to the states less than proportional share of judgeships in the current Ninth Circuit.

Opponents also argue that reversal rates have nothing to with case volume. Instead, additional judges would reduce the relative amount of cases per judge, thereby increasing the amount of judicial resources that can be devoted to each decision. This would increase the likelihood of identifying potential bases for reversal before issuing opinions.

This has been a topic that has been considered since the time of the creation of the Eleventh Circuit. The commission that led to the splitting of the Fifth Circuit also looked at whether the Ninth Circuit should split, but the decision was made to allow it to remain intact. The question has been revisited by commissions several times in the intervening years. Although the ABA initially supported division, it rescinded this position in 1990 and has been officially opposed to the split since that time. While the question of whether to continue opposing a split was hotly debated at the Young Lawyers Division Assembly at the Annual Meeting in New York this past August, it ultimately passed the Assembly.

It is an open question as to whether the 115th Congress will pass a restructuring of Ninth Circuit, or whether such a restructuring would alleviate the concerns that have caused people to call for the restructuring for the last thirty-five years. But if unsuccessful, the last thirty-five years of revisiting the topic indicate that the debate will not be easily stymied.

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9 Id.
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Call for Article Submissions – We Need Authors!

The Litigation Committee’s quarterly newsletter and 101/201 articles provide young lawyers a unique opportunity to have articles published and distributed to thousands of other young lawyers across the country. If you are interested in submitting an article for publication for 101/201 articles and the upcoming Winter 2017/2018 newsletter, please submit a brief description of your proposed article topic by November 15, 2017 to Co-Chairs Rich Rivera (rrivera@sgrlaw.com) and Graham Ryan (gryan@joneswalker.com).

For article topics that are approved, authors must submit draft articles and author agreements by December 6, 2017. Articles should be on recent legal developments or other topics of general interest to litigators and 600 to 1,200 words in length.

Upcoming Dates & Events

ABA Midyear Meeting
February 2 – 4, 2018
Vancouver, British Columbia

YLD Spring Conference
May 10 – 12, 2018
Louisville, KY

ABA Annual Meeting
August 2 - 4, 2018
Chicago, IL

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